UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In the Matter of:

MARIST COLLEGE

Employer,

Case No. 03-RC-127374

and

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200 UNITED,

Petitioner.

EMPLOYER'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON CHALLENGES TO THE RERUN ELECTION

Respectfully submitted,
BOND, SCHOENECK & KING, PLLC
Attorneys for Marist College
600 Third Avenue, 22nd Floor
New York, NY 10016-1915
T: 646.253.2300
F: 646.253.2301

Of Counsel:
Raymond J. Pascucci
Louis P. DiLorenzo
Tyler T. Hendry

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PRELIMINARY STATEMENT

Marist College ("Marist", "College" or "Employer") and Service Employees International Union Local 200 United ("Union", "SEIU" or "Petitioner") entered into a Stipulated Election Agreement ("SEA") that was approved by the Regional Director on May 12, 2014, containing the following unit description:

> [Including] All adjunct faculty employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer's Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors; but
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> [E]xcluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors, and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.

A mail ballot election was held and the ballots were counted on June 30, 2014. The challenged ballots were sufficient in number to affect the results of the election. The Petitioner also filed post-election objections. A hearing was held on the challenged ballots and the election objections. The Petitioner challenged a significant number of ballots on the theory that an adjunct who also holds another position with the College (i.e., "dual function") was ineligible to vote under the terms of the SEA. On November 17, 2014, Hearing Officer Thomas Miller issued his report on challenged ballots and objections recommending that certain ballots be overruled and counted and that certain objections be sustained ("First HOR"). The Employer filed exceptions to the First HOR with the Board in Washington, D.C.

On August 23, 2016, a three-member panel of the Board issued a decision adopting the hearing officer's recommendations concerning certain challenged ballots and objections and directing a second election in the event the Petitioner did not receive a majority of the votes cast. On dual function employees, the Board ruled "we find that the parties unambiguously intended to exclude any employees who hold specifically enumerated non-adjunct positions or any other non-adjunct positions and who also teach as adjuncts" 03-RC-127374 (2016) (not reported in Board volumes), and therefore these challenges were sustained. After certain challenged ballots were counted, the Petitioner did not receive a majority of the votes and a rerun election was ordered.

A mail ballot election was held and ballots were counted on October 31, 2016. The challenged ballots were again sufficient in number to affect the results of the election and the majority of ballots were again challenged by the Petitioner on the grounds that the voter held some form of dual function status. The same SEA was in effect for the 2016 election, except the new eligibility period required that the adjunct must have taught at least one credit hour in any given semester in the preceding twelve months (Fall 2015, Winter 2016, Spring 2016, Summer 2016 or Fall 2016), and the adjunct must have been employed in the unit during the payroll period ending September 15, 2016 (eligibility cut-off date).

A hearing was held on the challenged ballots, and Hearing Officer Neale Sutcliff issued her report on January 3, 2017 ("Rerun HOR"). Relying on the First HOR and the Board's 2016 Decision, Hearing Officer Sutcliff sustained challenges to 34 individuals who held some form of dual function status at the College. Marist takes exception to

these 34 challenges being sustained, and urges the Board to reconsider its previous decision and to properly apply its longstanding analysis relating to these dual function employees.[1]

Marist also takes exception to the findings in the Rerun HOR that John McCormick, Anna Dellomo, and Dean Goddard were employed in the bargaining unit as of the eligibility cutoff date.

A. Dual Function Employees Are Not Excluded Under the Terms of the SEA and They Share a Community of Interests with their Fellow Adjuncts.

As noted, the 34 challenges the Employer takes exception to are employees who held an adjunct position while at the same time holding another paid position with Marist as of the eligibility cutoff date and at the time of the election. The parties entered a factual stipulation regarding 33 of these employees at Joint Ex. 1, which includes the courses taught by the adjuncts at the College during the eligibility period and the other position(s) held. Additionally, hearing evidence established that Robin Elliott taught as both an adjunct and as a teaching assistant and therefore, the Hearing Officer found her to be ineligible as a dual function employee.

We respectfully submit that the analysis in the First HOR, which was fundamentally adopted by a three-member panel of the Board, was flawed with respect to its analysis of dual function employees. We urge the Board to reconsider this issue and to apply longstanding Board precedent that was not expressly disavowed or

[1] Marist takes exception to the Hearing Officer's conclusion that the ballots of the following 34 individuals should be excluded: 1. John Ansley, 2. Christopher Bowser, 3. Kathy Butsko, 4. Stephanie Calvano, 5. Jeffrey Carter, 6. Peter Colaizzo, 7. Toni Constantino, 8. Richard Cusano, 9. Joseph Ellman, 10. Freddimir Garcia, 11. Brian Gormanly, 12. Mary Elana Griffith, 13. Justin Guiliano, 14. Clarence Johnson, 15. Colleen Kopchik, 16. Cecil Lee, 17. Fan Li, 18. Jennifer McMillan, 19. Michael Napolitano, 20. David Nash, 21. Corri Nicoletti, 22. Sara Nowlin, 23. John Pinna, 24. Adam Porter, 25. Mary Rice, 26. Adam Ritter, 27. William Robelee, 28. Diedre Sepp, 29. Timothy Smith, 30. Keturah Springate-Lewis, 31. Jared Todisco, 32. Karen Tomkins-Tinch, 33. Laura Toonkel, and 34. Robin Elliott.

overruled, but instead was erroneously ignored in the First HOR and in the Board's adoption of that decision.

The Board's analytical framework for addressing this issue is well established. The Board applies a three-prong test to determine whether challenged voters are properly included in a stipulated unit:

> … [T]he Board must first determine whether the stipulation is ambiguous. If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board simply enforces the agreement. If, however, the stipulation is ambiguous, the Board must seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence. If the parties' intent still cannot be discerned, then the Board determines the bargaining unit by employing its normal community-of-interest test.

Caesar's Tahoe, 337 NLRB 1096, 1097 (2002); *see also Halsted Communications*, 347 NLRB 225, 225 (2006).

The first step in the Board's three-step analysis is to determine whether the terms of the stipulated election agreement unambiguously express the objective intent of the parties to include or exclude the employee(s) in question. *See Halsted Communications*, 347 NLRB 225, 225 (2006); *Caesar's Tahoe*, 337 NLRB 1096, 1097 (2002). In assessing whether a stipulation is clear or ambiguous, the Board compares the express language of the stipulated bargaining unit with the disputed classification. *Butler Northwest Community Hospital*, 331 NLRB 307 (2000). Where a stipulation neither includes nor excludes a disputed classification, the Board will find the parties' intent is not clear. *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1235 (2003). In our case, the SEA never mentions dual function employees. Where a stipulation excludes "all other employees," the Board will interpret the stipulation to

clearly exclude all classifications not expressly included in the unit description. *See e.g., Bell Convalescent Hospital*, 337 NLRB 191, 191 (2001). In our case, the "all other employees" language appears in the excluded section, and the included section explicitly refers to "all adjunct faculty".

1. The SEA and the Flawed Analysis

In the First HOR, Hearing Officer Miller failed to apply these principles. As set forth above, in their May 2014 SEA, the parties defined the bargaining unit as follows:

> [Including] All adjunct faculty employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer's Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors; but
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> excluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, administrators, coaches, librarians, directors, managers, guards, supervisors, and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities.

The 34 Union Challenges in this case all involve employees who held more than one position at Marist College. It is undisputed that every one of the 34 employees served as adjunct faculty members during the eligibility period. In addition, however, these adjunct faculty members also held another position with Marist. Thus, they are dual function employees. The key issue for determination with respect to all 34 Union challenges is whether these dual function employees should be included or excluded from the stipulated unit.

When the operative language is boiled down to its essence, the parties explicitly agreed in the SEA (with the Regional Director's approval) to include "all adjunct[s]" with

certain specifications,[2] and to exclude "all other employees" regardless of any teaching responsibilities. In simple terms, adjuncts are in, and non-adjuncts are out.

"All" means everyone. (See any English language dictionary). "All adjuncts" means everyone who is an adjunct (during the eligibility period and as of the cutoff date and the election date). "Other" means something distinct from something else. (See any English language dictionary). "All other employees" means all employees other than adjuncts. In discerning the objective intent of the parties, the words the parties used should be given their common and ordinary meaning.

In crafting their stipulation, the parties did not insert any words of restriction with respect to the inclusion of all adjuncts, such as "adjuncts who do not hold another position with the Employer" or "adjuncts who work for the Employer in a dual function capacity" or "employees who work exclusively as an adjunct."

Nor in crafting their stipulation, did the parties insert any words in the excluded section explicitly carving out those adjuncts who "hold another position with the Employer," or who "are dual function employees," or who "work for the Employer in another capacity in addition to their adjunct position."

Therefore, based on the ordinary meaning of the words the parties used in defining the unit, we submit that the terms of the SEA unambiguously express the objective intent of the parties to include "all adjuncts" regardless of whether they hold another position with Marist. According to the Board's well established analytical framework, there is no need to go beyond the first step. All adjuncts are unambiguously

[2] The parties also agreed to include "Student Teacher Supervisors" but none of the issues in this proceeding pertain to that classification.

included. A person who works in an adjunct position does not stop being an adjunct merely because he/she also works in another position.

In the First HOR, Hearing Officer Miller not only failed to reach the obvious conclusion as set forth above that dual function adjuncts are UNAMBIGUOUSLY INCLUDED, but he somehow reaches the opposite conclusion that dual function adjuncts are UNAMBIGUOUSLY EXCLUDED, even though nothing in the SEA explicitly addresses employees holding more than one position.

After quoting the agreed-upon unit description, without providing any analysis or reasoned discussion of the included classifications versus the excluded classifications, Hearing Officer Miller simply declared that, "[t]he language of the Agreement is carefully tailored to exclude all individuals whose primary role with the Employer is not as an adjunct." (First HOR, p. 10). There is no basis in the language of the SEA for the conclusion that the parties adopted a "primary role" standard for employees who may serve in more than one capacity. Not only is his conclusion completely unfounded, but by concocting a "primary role" standard out of thin air, he short-circuited both the second prong of the Board's analysis (*i.e.*, applying normal methods of contract interpretation to ascertain the intent of the parties) and the third prong of the Board's analysis (*i.e.* applying its community-of-interest analysis). In the First HOR, Hearing Officer Miller goes on to discuss the excluded classifications of "director", "manager" "administrator", etc., while completely ignoring the first three words of the agreed-upon unit description, which expressly INCLUDE "*ALL* adjunct faculty" (emphasis added).

The Board has held and Hearing Officer Miller accurately cited to case law holding that where a stipulated election agreement excludes "all other employees," the Board will interpret the stipulation to clearly exclude all classifications that are not

expressly included in the unit description. *See e.g., Bell Convalescent Hospital*, 337 NLRB 191, 191 (2001). Here, however, Hearing Officer Miller simply chose to ignore the fact that the SEA expressly INCLUDES the "adjunct faculty" classification and excludes all OTHER employees. Thus, since the SEA explicitly includes ALL "adjunct faculty," and does NOT explicitly exclude ANY "adjunct faculty", the clear and unambiguous language overrides Hearing Officer Miller's attempt to effectively re-write what the parties agreed to.

In doing so, Hearing Officer Miller points to the final clause in the excluded section containing the phrase "whether or not they have teaching responsibilities" in reference to the exclusion of "all other employees." However, Hearing Officer Miller fails to explain how this language supports his conclusion. The phrase appears at the end of a sentence that begins by referring to various other types of faculty members besides adjuncts (all of whom teach), then refers to various administrative and other non-faculty positons (most of whom presumably do not teach), and closes by referencing all other employees regardless of whether they teach or not. The obvious purpose of the phrase is to cover all of the bases in a school setting: all non-adjuncts within the faculty ranks; the listed non-faculty positions; and all other employees regardless of whether or not some component of their job involves elements of teaching (e.g. teaching assistants, clinical specialists, program coordinators who not only coordinate others but also do some of the teaching or co-teaching, etc.). Without any basis for doing so, Hearing Officer Miller apparently inferred that the reference to "other teaching responsibilities" is a reference to other teaching responsibilities in an adjunct capacity. Thus, under his construction, the language is interpreted to mean: all adjuncts are included; all other faculty are excluded; various listed non-faculty positions are excluded; and all other

employees are excluded including those who also teach as an adjunct. This tortured construction is not supported by the language the parties used, by the context, or by any extrinsic evidence of the intent of the parties.

Having reached the unsupported and inexplicable conclusion that the SEA unambiguously excludes adjuncts who also hold another paid position with Marist, Hearing Officer Miller never reaches the second or third step in the Board's three-step analysis. In cases where a stipulated election agreement is ambiguous, the Board's second step is to try to determine the parties' intent through usual methods of contract interpretation, including the examination of extrinsic evidence. *See Caesar's Tahoe*, 337 NLRB at 1097. Where there is no extrinsic evidence the Board's third and final step is to determine the bargaining unit through application of its community-of-interest analysis. *Ceasar's Tahoe*, 337 NLRB at 1097.

Contrary to Hearing Officer Miller's unsupported and flawed analysis, under the first prong of the Board's challenged ballot analysis in a stipulated election, in assessing whether the stipulation is clear or ambiguous, the Board compares the express language of the stipulated bargaining unit with the disputed classification. Here, the Stipulation expressly includes "[a]ll adjunct faculty", but does not explicitly exclude "adjunct faculty who are dual function employees," or "adjunct faculty who also hold another position with the College," or "adjunct faculty who are also directors," etc. Based on a plain reading of the language, after expressly stating that "[a]ll adjunct faculty" are included, the excluding "all <u>other</u> faculty" language can only mean faculty members who are <u>not</u> adjuncts teaching online or at Poughkeepsie or Fishkill. Likewise, the excluding of certain job titles and "all <u>other</u> employees" language can only mean all such employees who are <u>not</u> adjunct faculty members or who teach in an off-

campus classroom. Therefore, the College submits that the stipulated language does in fact clearly and unambiguously provide that "[a]ll adjunct faculty" are included, and the 34 excluded ballots should therefore be counted.

2. Normal Methods of Contract Interpretation Reveal an Intent to Include All Adjuncts Regardless of Any Other Positions Held.

Assuming for the sake of argument that the express inclusion of "[a]ll adjunct faculty" was not found to be clear and unambiguous and thus dispositive with respect to the 34 dual function employees in dispute, the second step in the Board's three-step analysis for resolving challenges in a stipulated election is to seek to determine the parties' intent through normal methods of contract interpretation, including the examination of extrinsic evidence.

Hearing Officer Miller was correct in finding that the language in the SEA was "carefully crafted" by high-ranking party representatives and their respective highly experienced labor counsel. The language relating to the included employees is very specific – "[a]ll adjunct faculty employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at either the Employer's Poughkeepsie, New York campus or its Fishkill, New York campus, and Student Teaching Supervisors." This specificity was necessary to explicitly encompass not only undergraduate adjuncts, but also graduate adjuncts; and not only adjuncts who teach in the classroom, but also adjuncts who teach online. The excluded language is also very specific – "all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus". The excluded language goes on to list a series of non-faculty positions – "administrators, coaches, librarians,

directors, managers, guards, supervisors, and professional employees as defined in the Act, and all other employees whether or not they have teaching responsibilities."

Given that the parties were manifestly capable of using explicit terms to carefully spell out exactly who was included and who was not, as a matter of contract interpretation, they should be considered capable of having expressly excluded dual function adjuncts if that is what they intended. In the included language, instead of simply stating "[a]ll adjunct faculty employed by the Employer who teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at [the Poughkeepsie or Fishkill campuses]", the parties could have inserted a few simple words to carve out dual function adjuncts if that's what they intended as follows:

> [a]ll adjunct faculty employed by the Employer who ***[do not hold any other position with the Employer and who]*** teach undergraduate and/or graduate level courses, who teach in the classroom and/or online, and who teach courses at [the Poughkeepsie or Fishkill campuses].

(highlighted language not in original). Similarly, the parties could have added a few simple words to the excluded language in order to delineate that dual function adjuncts are excluded if that was their intent:

> "[E]xcluding all other faculty, tenured and tenure eligible faculty, full-time faculty and faculty who only teach in the classroom at locations other than the Poughkeepsie Campus or the Fishkill Campus, ***[adjuncts who also hold positions as]*** administrators, coaches, librarians, directors, managers, guards, supervisors, and professional employees as defined in the Act, ***[and adjuncts who hold any other position with the Employer]***, and all other employees whether or not they have teaching responsibilities."

(highlighted language not in original). The fact that the parties chose not to insert the above additional words supports an inference that they intended to include ALL ADJUNCTS without regard to whether or not they hold another Marist position.

In effect, the First HOR and the Board's adoption of that decision: (1) disregarded the explicit use of the word "all" next to the words "adjunct faculty" in the included portion of the SEA; (2) implied words that do not appear in either the included portion or the excluded portion of the SEA; and (3) relied on a mere unfounded assertion that "[t]he language of the Agreement is carefully tailored to exclude all individuals whose primary role with the Employer is not as an adjunct." Thus, this analysis is flawed on multiple levels – the conclusion that the parties intended to exclude dual function adjuncts is neither clear and unambiguous from the explicit wording that the parties used, nor is the interpretation supportable based on ordinary methods of contract interpretation (particularly given that the party seeking to exclude a ballot bears the burden of proof, which is something that Hearing Officer Miller failed to even mention in his 87-page report).[3]

On the contrary, the only possible interpretation based on ordinary principles of contract interpretation is that the parties intended to INCLUDE "[a]ll adjunct faculty" regardless of whether or not they were dual function employees. If the parties had intended to exclude certain adjuncts because they hold another position with Marist, they could have said this in the SEA, but they did not. In fact, the word "adjunct" never appears in the excluded section of the unit definition.

[3] Hearing Officer Miller correctly noted in the Objections section of the 2014 Decision that the objecting party bears the burden of proof; but he totally disregarded the burden of proof with respect to the challenges on the dual function basis even though it is well-established that this burden falls squarely on the party seeking to exclude a challenged individual from voting, as properly pointed out by Hearing Officer Sutcliff in the Rerun HOR. (Rerun HOR, p. 6). *See Sweetener Supply Corp.*, 349 NLRB 1122 (2007).

Hearing Officer Miller based his interpretation of the SEA as excluding all dual function adjuncts on the parties' use of the phrase "whether or not they have teaching responsibilities" after the words "and all other employees" at the end of the exclusionary section. He concluded that this phrase clearly evinces an intent "to exclude employees who also teach", reasoning as follows:

> If the intent of the parties was to include employees who also served as adjuncts, the inclusionary language would have referred to adjuncts who also served in another capacity with the Employer. The only mention of employees with multiple roles comes via the exclusions, where the parties agreed that "all other employees whether or not they have teaching responsibilities" were excluded. Accordingly, I find that the Agreement clearly and unambiguously includes only those adjuncts who were not otherwise employed with the Employer during the eligibility period and on the date they mailed their ballots.

(First HOR, p. 11). Hearing Officer Miller's misguided analysis contains several flaws. First, his attempt to use the final phrase to find meaning in the included section is a method of contract interpretation which belies his conclusion that the SEA clearly and unambiguously excludes dual function adjuncts. More importantly, his analysis is predicated on assumptions that are not supported by any record evidence, but clearly contradicted by the record evidence.

Hearing Officer Miller apparently assumed that the closing reference to "teaching responsibilities" can only mean teaching in an adjunct capacity; yet there is no evidence to support this assumption. The record evidence clearly establishes teaching assistants, clinical supervisors, program coordinators, and other positions may include some teaching responsibilities as part of the position's regular duties which is clearly not

adjunct work.[4] Similarly, Hearing Officer Miller erroneously assumed that this phrase "relates to employees with multiple roles" (*i.e.* multiple job classifications), which, as just explained, is not a valid assumption.

Finally, Hearing Officer Miller assumed that the phrase in question modifies all of the foregoing language in the Stipulation which is not correct according to established principles of contract/statutory interpretation. According to the "series-qualifier canon", when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series. *See* Scalia-Garner, Reading Law: The Interpretation of Legal Texts, p. 147-150. The "whether or not they have teaching responsibilities" clause in the Stipulation is a "postpositive modifier" because it is positioned after the subject(s) it modifies. Importantly, the language used by the parties throughout the SEA does not follow a straightforward, parallel construction.

In delineating how these modifiers should be interpreted, Scalia discusses one case in particular that is relevant to the postpositive modifier "whether or not they have teaching responsibilities" clause herein. *See United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972). In *Pritchett* the court had to determine the reach of the phrase "when on duty" in the context of the following exclusionary code provision: "jail wardens, or other deputies, policemen or other duly appointed law enforcement officers, or to members of the Army, Navy, or Marine Corps of the United States or of the National

[4] In addition to teaching assistants and clinical specialists, coordinators and others often have teaching responsibilities, See e.g., 2014 Transcript, Emp. Ex. 26 (a coordinator required to teach developmental reading) and 2014 Transcript, Emp. Ex. 28 (a coordinator required to instruct two sections of Freshman Forum). They would be excluded even though they have teaching responsibilities as part of their job. However, if they also happen to be teaching additional classes as adjuncts, they would be included by the SEA.

Guard or Organized Reserves when on duty." (emphasis added). The question was whether a jail warden was excluded from the prohibition that preceded this series when he was not on duty (*i.e.*, whether "when on duty" modified the portion of the exclusion that referred to jail wardens). The court held that "when on duty" did not modify the earlier portion referring to jail wardens or their deputies. Rather, the court reasoned, because the drafters had omitted a comma before "when on duty," the phrase could not modify the preceding portions. As the code provision was written, the "when on duty" modifier did not extend to jail wardens and their deputies (or policemen or other duly appointed law enforcement officers) because the words "or to" plainly set the last phrase apart from the rest. Only by deleting the "to" and including a final comma could "when on duty" apply to jail wardens. As it read, only members of the Army, Navy or Marine Corps or of the National Guard or Organized reserves were excluded when they were on duty.

The same reasoning applies to the SEA in this case. Because of the "and" that precedes "all other employees," the full final phrase stands alone. Only if the parties had deleted the immediately preceding "and" (before "professional employees as defined…") while also including a comma before "whether or not they have teaching responsibilities," would the phrase modify "administrators, coaches, librarians…." Instead, as it is written, the listed Marist job categories are unaffected by the "teaching responsibilities" modifier. Thus, they are excluded only if they are not already included as "adjunct faculty."

The Board's decision in *Lucky Stores, Inc.*, 279 NLRB 1138 (1986), is also instructive. That case presented the issue of how to interpret Section 10(c) of the Act, which states that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, ***as will effectuate the policies of this Act***.

(emphasis added). The question was whether the modifier "as will effectuate" applied to serving an order to cease and desist and affirmative action, or only affirmative action. *Id.* at 1147. Before ruling, the Board stated that "there is considerable room for doubt that the above-quoted portion of Section 10(c) of the Act does impose a duty to disregard every other consideration and to automatically issue a cease and desist order whenever it is concluded that an unfair labor practice has occurred." *Id.* Thus, the Board admitted that even when the modifier is separated by a comma, uncertainty persisted as to whether the modifier applied only to its nearest reasonable referent.

Despite acknowledging this potential uncertainty, the Board peremptorily held that "[n]othing in the construction of this statutory direction, viewed in its entirety, restricts the 'as will effectuate' portion to only the 'affirmative action' facet of the overall mandate." *Id.* Indeed, according to the Board, "the fact that there is a comma before and another after the 'affirmative action' portion indicates no more than that Congress intended to distinguish the affirmative aspect of an order from the negative or 'cease and desist' one as a means of clarifying the distinction between the two of them." *Id.* at 1147-48. Therefore, the mandate of Section 10(c) required both affirmative action and

a cease and desist order to effectuate the policies of the Act. *Id.* at 148. In effect, the Board held that the modifier applied to the cease and desist order only because of the comma that set the modifier apart from the phrase immediately preceding it. Only greater doubt would reign in the absence of this comma.

The sentence at issue in our case is immediately distinguishable from the statute interpreted in *Lucky Stores.* Where Section 10(c) prevents coupling of the modifier and its immediately preceding referent by separating the modifier with a comma, the SEA contains no such separating punctuation. Instead, the lack of a comma requires that the modifier apply only to its nearest reasonable referent, "all other employees." Thus, just as the Board held in *Lucky Stores, Inc.* that a postpositive modifier could apply to a preceding series only when the modifier was uncoupled from its nearest referent by a comma, the omission of a comma in the SEA makes it clear that "whether or not they have teaching responsibilities" only applies to "all other employees."

The significance of these case law principles of contract/statutory interpretation is that they completely undermine Hearing Officer Miller's analysis concerning the parties' use of the closing phrase "whether or not they have teaching responsibilities." Hearing Officer Miller deemed this clause to inject meaning into not only the "other employees" exclusion, but also every other listed exclusion, as well as somehow limiting the "[a]ll adjunct faculty" language that appears at the very beginning of the included section. This analysis flies in the face of established methods of contract/statutory interpretation and must therefore be rejected.[5]

[5] Two additional flaws in Hearing Officer Miller's analysis are noteworthy. First, Hearing Officer Miller's own analysis is internally inconsistent. On the one hand, he erroneously concluded that the SEA clearly and unambiguously adopted a "primary duty" test, even though no such language is anywhere to be found; while on the other hand, he proceeded to find that the mere existence of any other position with

3. The 34 Adjuncts At Issue Share a Community of Interest with All Other Adjuncts Who Voted in the Election

Assuming for the sake of argument that the parties' intent cannot be discerned from the express inclusion of "[a]ll adjunct faculty" and the absence of any words explicitly excluding dual function adjuncts based on normal principles of contract interpretation, the final step in the Board's three-step analysis for resolving challenges in a stipulated election is to determine the bargaining unit through application of its community-of-interest analysis. *Caesar's Tahoe*, 337 NLRB at 1097.

Where an employee performs multiple job functions covered by one or more of the employer's job classifications, the employee is considered to be a dual function employee and the Board applies a slight variant of its regular "community-of-interest" analysis. *See Columbia College*, 346 NLRB 726, 738 (2006); *Berea Publishing*, 140 NLRB 516, 519 (1963). For the most part, the same community-of-interest tests are applied to dual function employees as are applied to part-time employees. *See Berea Publishing Co.*, 140 NLRB 516 (1963); *Wilson Engraving Co.*, 257 NLRB 333 (1980). In enunciating its dual function policy, the Board stated that it would "perceive no distinction between the part-time employee who may work for more than one employer and the employee who performs dual functions for the same employer." *Berea*, 140 NLRB at 519.

The test for determining whether a dual function employee should be included in a unit is whether the employee performs "unit work" for sufficient periods of time to demonstrate that he or she has a substantial interest in the wages, hours, and conditions of employment for such unit work. *See Bredero Shaw,* 345 NLRB 782, 786

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the College, no matter how brief in duration or how few hours are involved, is an automatic disqualifier. Thus, having concocted a primary duty test out of thin air, Hearing Officer Miller went on to ignore his own test.

(2005). The Board has no bright-line rule as to the amount of time required to be spent performing unit work, but rather makes this determination based on the facts of each case. *Id.*

There is little Board authority discussing the amount of time that would be deemed sufficient in the unique setting here where the petitioned-for unit consists solely of part-time employees. Typically, the dispute involves determining whether a part-time or dual function employee performs sufficient unit work to be included in a unit comprised of full-time employees in only one of the two job classifications held by the dual function employee. *See, e.g., Columbia College*, 346 NLRB 726 fn. 4 (2006) (analyzing the dual function status of certain faculty members where the stipulated bargaining unit consisted of "all full-time and regular part-time staff employees"). When analyzing a "sufficient amount of time" for dual function employees in that context (*i.e.*, whether the dual function employees spend a sufficient amount of time as compared to full-time and regular part-time employees), the Board has refused to adopt a bright-line rule but has suggested a guideline that to be included, the dual function employee should spend somewhere around 25% or more of his/her time performing unit work. *See WLVI, Inc.*, 349 NLRB 683 fn. 5 (2007).

Significantly, in *Columbia College*, the Board at least implicitly recognized the unique situation presented in academic settings, by finding that an employee who spent only three hours per week tutoring was sufficient to establish that she should be considered an eligible dual function employee. The Board found that while the actual hours the employee spent tutoring were quite low, the fact that she had performed such work on a regular basis for over 5 years demonstrated that she had a meaningful interest in the terms of that work, and thus, must be included as a dual function employee. *Id.* at fn. 10. In short, the Board dispensed with the 25% of total time analysis

in the *Columbia College* case, relying instead on the regularity of the tutoring work to find a sufficient community of interest for inclusion in the unit. *Id.* at 729.

Applying the 25% guideline in this case does not make practical sense where all of the adjuncts to be included in the unit are part-time employees themselves; and where the challenged employees, when serving in their role as adjuncts, have a distinct employment relationship and time commitment that is essentially identical to those part-time adjuncts who do not hold a second position at Marist. This is not a typical situation where an individual is holding a single, integrated job with responsibilities that span multiple classifications. Instead, the duties of these individuals in their other positions are easily distinguishable from their adjunct faculty positions.

The Board has not yet addressed how to analyze a "sufficient amount of time" under these unique circumstances, nor did we find any ALJ or Regional Director decisions conducting such an analysis. The most similar (although not identical) situation was addressed in an Administrative Law Judge Decision involving part-time faculty in *George Washington University*, Case No. 5-RC-15715 (ALJ William G. Kocol, March 25, 2005). In that case, the parties stipulated to a unit including all regular part-time faculty compensated per course, but excluding administrators, managers, and supervisors. The petitioner contended that a number of voters were ineligible because in addition to working as part-time faculty members, they were also administrators, managers, or supervisors. Without performing an analysis of the percentage of time worked in each position, the ALJ rejected the petitioner's argument and included all of the adjunct/administrators as dual function employees. The ALJ analyzed only whether the disputed individuals had supervisory or managerial authority, and after finding that they did not, he included each of them in the petitioned-for unit. Thus, the ALJ found that the alleged adjunct/administrators were properly included as dual function

employees, regardless of the relative time they may have spent working in their other position.

In *Pacific Lutheran Univ.*, 2013 NLRB Reg. Dir. Dec. LEXIS 100, Case No. 19-RC-102521, Region 19 (June 7, 2013), the petitioner sought a unit of all non-tenure-eligible contingent faculty who were employed by the university and taught a minimum of three credit hours during an academic term. The employer sought to exclude all such contingent faculty with full-time jobs elsewhere, contingent faculty holding appointments at other universities, and retirees who returned to serve as part-time faculty. In rejecting the argument that contingent faculty with full-time employment elsewhere should be excluded, the Regional Director found that:

> Where an employee has a full-time job elsewhere but works regular shifts as needed by the employer, that employee will be included in the unit. *V.I.P.* Radio, 128 NLRB 113 (1969). Here, contingent faculty with other full-time jobs teach regularly scheduled classes. They work as needed by the Employer. Therefore, contingent faculty with full-time employment elsewhere will not be excluded from the unit on that basis alone.

Although this decision did not address dual function employees, it is instructive because of the Board's policy that it "perceive[s] no distinction between the part-time employee, who may work for more than one employer, and the employee who performs dual functions for the same employer." *Berea*, 140 NLRB at 519.

As applied to the alleged dual function employees at issue for Marist, when fulfilling their role as adjuncts, the individuals teach regularly scheduled classes on the same academic calendar as other adjunct faculty; they receive the same form of pay; and they work under the same terms and conditions of employment. The fact that they may hold other positions or perform other duties at the College separate and apart from these adjunct duties should not be reason for their exclusion from the unit.

Based on the above, Marist submits that the typical percentage analysis applicable to dual function employees does not fit the circumstances of this case; and, instead, the Board should find that the challenged voters who happen to hold another position at Marist in addition to their adjunct position are included under its long-standing community-of-interest standard as applied to dual function employees.[6]

4. <u>The 34 Adjuncts Are Eligible</u>

Contrary to the Union's challenges, the 33 individuals listed in Joint Ex. 1 and Robin Elliott are eligible and should have their ballots counted by virtue of having taught as an adjunct during the eligibility period under the clear and unambiguous terms of the SEA and/or under the Board's community-of-interest analysis as applied to dual function employees in the context of college adjunct faculty members.

With respect to some of these individuals the Union based its challenge on the additional ground that their other non-adjunct position is otherwise purportedly explicitly excluded under the SEA (e.g., a director, manager, etc.). Although ignored by Hearing Officer Miller, it is obvious from the context that the parties intended to exclude "directors" and "managers" only insofar as such positions involved supervisory and/or managerial authority over other employees. The parties never contemplated or intended to exclude someone who manages equipment but not people, for example, merely because the word "manager" appears in that individual's title; nor did they intend

[6] Even assuming that the typical dual function-percentage-of-time-devoted-to-each-position analysis were applied in this case, the challenged voters would still be eligible because record evidence from the post-election hearing following the 2014 election established that adjuncts who teach a single three credit course spend approximately 15-20 hours per week doing so. (2014 Transcript, Tr. 170-73; 206, 285-86, 291). Thus, an adjunct who teaches just a single three credit course spends 15-20 hours per week in that capacity and who holds another 37.5 hour per week full-time position at Marist (full-time positions at Marist are 37.5 hours positions (2014 Transcript, Tr. 678-89)) would be devoting at least 29-35% of the time to their adjunct role and no more than 65-71% of their time to the other role. Accordingly, should the Board find it necessary to apply the dual function analysis by percentage of time, the evidence regarding credit hours taught each semester by the Employer show that each employee at issue worked sufficient hours as an adjunct to meet the Board's analysis. See Jt. Ex. 1.

to exclude someone who directs music or performing arts but not people, for example, merely because the word “director” appears in their title.

In this regard, the burden of proof becomes important. The Union is the party seeking to exclude certain individuals from having their ballots counted in part on the ground that the word “manager” or “director” appears in their non-adjunct job title; yet the Union failed to produce any evidence that any of these individuals had any supervisory authority as defined in Section 2(11) over any employees. Therefore, we submit that the Union’s attempt to exclude any individuals on this basis should be rejected.

In summary, Marist College’s position with respect to all 34 employees is as follows:

(1) It is undisputed that each listed employee taught as an adjunct during the requisite period;

(2) Since the parties agreed in the SEA to include “all adjuncts” they are eligible and their ballots should be counted;

(3) They should also be found eligible in accordance with the Board’s longstanding dual function employee analysis because all of the listed employees share a community of interest with the other adjuncts in the voting unit; and

(4) Finally, the Union failed to prove that any of the listed employees has Section 2(11) authority over

any other employees, and thus failed to carry its burden to prove that they are ineligible.

Thus, the Board should reevaluate its previous ruling and find the 34 dual function employees eligible to vote.

B. John McCormick and Anna Dellomo Resigned from Their Positions and Were Ineligible to Vote

Marist also excepts to the Hearing Officer's finding that John McCormick (Rerun HOR p. 46-47) and Anna Dellomo (Rerun HOR p. 31-33) did not leave their adjunct positions prior to the election.

1. John McCormick

John McCormick last worked as an adjunct and/or student teaching supervisor in Fall 2015. (Tr. 167-68). The uncontroverted evidence establishes that in December 2015, Mr. McCormick told Associate Dean for Teacher Education, Edward Sullivan, that "he would not be returning in the future to us [Marist]" because he wanted to travel, enjoy his retirement, and perform work on a new home he had purchased. (Tr. 168-169). Mr. McCormick further stated that he wished everyone well; that he would not be returning to his adjunct position; and that he did not foresee taking on any future appointments. (Tr. 169-70). Consistent with his expressed intentions at the time of his resignation/retirement, Mr. McCormick has not since worked as an adjunct, and he has not communicated to Marist any interest in doing so. (Tr. 170).

Contrary to the Hearing Officer's finding (Rerun HOR, p. 46-47), the above evidence clearly establishes that Mr. McCormick, by his words and his actions, evidenced a clear intent to resign his position prior to the election. The Hearing Officer primarily bases her finding on a statement made by Mr. McCormick that the College

could reach out to him if there was a serious need, but Mr. McCormick specifically qualified this statement by saying he could not foresee being able to handle any future appointments, and this statement was made in the context of wishing everyone well and advising that he would not be returning to his position.[7]

The Hearing Officer cites to *Orange Blossom Manor* in support of her determination, but this case bears no resemblance to the situation there and appears to be cited only for the broad proposition that an employee must express a clear intent to quit. In this proceeding, that standard has been met and Mr. McCormick's statement regarding potentially calling him in the future does not cast doubt on Mr. McCormick's intention to resign as of December 2015. *See Dakota Fire Protection Inc.*, 337 NLRB 92, 92-93 (2001) (resignation letter stating "please keep me in mind for possible employment next summer if you need a part time employee again" insufficient to establish continued employment); *Columbia Steel Casting Co.*, 288 NLRB 306, 306 (employee in retirement status on day of election was ineligible to vote; determinative factor was his "actual status on the date of the election . . . not his subjective intent to terminate his retirement and attempt to return to work for the Employer at some later date").

Additionally, to the extent that the Hearing Officer found it relevant that this was only one conversation and there was no written resignation letter, these considerations are misplaced. In *Angotti Healthcare Systems*, the Board held an employee was not an eligible voter because she voluntarily resigned her position. 346 NLRB 1311, 1315 (2006). The only evidence in regards to this resignation was a conversation that

[7] The Union presented no evidence regarding Mr. McCormick.

occurred between the employee and her manager. The manager testified that the employee had been accepted into a paramedic program, and the employee expressed "she wanted us to no longer have her on the schedule, and she no longer was going to be called for any shifts. She wanted to devote her entire time to the paramedic program." Further, the manager testified that as a result of this conversation he understood the employee no longer desired to work for the employer. The Board found the single conversation was sufficient to find the employee had resigned and was not an eligible voter.

The Hearing Officer's finding that Mr. McCormick continued to be employed by Marist at the time of the election in October 2016 is not supported by substantial evidence in the record or the law. Rather, the record evidence establishes that Mr. McCormick resigned/retired at the end of the Fall 2015 semester. Accordingly, his ballot should not be counted.

2. <u>Anna Dellomo</u>

The conclusion of Ms. Dellomo's employment is strikingly similar to the situation in *Angotti Healthcare, supra.* Ms. Dellomo last taught as an adjunct in Fall 2015. Since that time, Ms. Dellomo left her full-time job at a nearby hospital; moved out of state to attend graduate school in Maryland; did not respond when contacted about teaching again the following Fall; and has not communicated to the College that she has any plans to return to the area or to Marist. Given that Ms. Dellomo's relocation to Maryland makes it physically impossible to resume teaching at Marist, and that she failed to respond when contacted about continuing her employment, the only rational conclusion is that she resigned, and this is the conclusion that Marist reached. (Tr. 201, 205, 286-87, 313-14, Emp. Ex. 48).

Once again, the Hearing Officer's finding that Ms. Dellomo continued to be employed by Marist at the time of the election in October 2016 is not supported by substantial evidence in the record. Rather, the record evidence establishes that Ms. Dellomo abandoned her position when she moved away and ceased responding to or otherwise communicating with the College. Accordingly, her ballot should not be counted.

C. Dean Goddard Was Laid Off From His Position and Has No Reasonable Expectation of Recall

Marist also excepts to the Hearing Officer's finding that Dean Goddard was employed in the bargaining unit as of the date of the election.

As set forth in both Hearing Officer Miller's and Hearing Officer Sutcliff's Decision, these circumstances should be analyzed "akin to a layoff."[8] (First HOR, p. 46). "In such situations, the Board has held that an employee is eligible to vote provided he or she has a reasonable expectation of recall. *Tomadur, Inc.*, 196 NLRB 706, 707 (1972)" (*Id*). In analyzing a reasonable expectation of recall, the Board looks at (1) the employer's past experience and future plans, (2) the circumstances surrounding the layoff, and (3) what the employees were told about the likelihood of recall in the near future. All of these factors are considered and what employees were told is not determinative. *Overnite Transportation Company*, 334 NLRB 1074, 1098 (2001).

Both Hearing Officers appropriately found guidance from the Board's decision in *Foam Fabricators*, 273 NLRB 511 (1984). In that case the Board held:

> Absent any employer past experience or future plans, where an employee is given no estimate as to the duration of the layoff or any specific

[8] Rejecting the Petitioner's attempt to argue that cases involving temporary employees are applicable in the context of adjunct faculty members.

> indication as to when, if at all, he will be recalled there is no reasonable expectancy. Vague statements by the employer as to the "chance" or "possibility" of the employee being rehired do not provide an adequate basis for concluding that the employee had a reasonable expectancy of reemployment.

273 NLRB at 512.

1. Dean Goddard

Contrary to the Hearing Officer's finding (Rerun HOR, p. 42-44), Dean Goddard has no reasonable expectation of recall and has been laid off. Mr. Goddard last taught as an adjunct in the Fall of 2015, and has not returned since that date. (Tr. 119-20). Mr. Goddard was offered a position to teach in Spring 2016, however, he declined that offer to teach because he had other employment, and based on this refusal, he was told he would not be subject to recall. (Tr. 120-121).

With regard to the first element of the test set forth above, the testimony clearly established that the College has no foreseeable need for Dean Goddard based on the curriculum and its practice of reappointing adjuncts who have served the previous semester. (Tr. 138). As explained by the Hearing Officer, the new core curriculum was introduced reducing the required number of science courses for all students down to one. This resulted in a decreased demand for science courses. Specifically, Intro to Environmental Issues, the course that Mr. Goddard routinely taught, saw a dramatic decrease in student enrollment, and there is a continued reduced need for adjunct professors to teach the same course going forward that Mr. Goddard had taught in the past. (Tr. 125, Emp. Exs. 39-40). Accordingly, James DuMond, Dean of the School of Science, testified that even if Mr. Goddard showed any interest in returning, which he has not, enrollment in the course has been dwindling based on the change in the core curriculum and Dean DuMond does not foresee any future need to bring in former

adjuncts like Mr. Goddard who taught for Marist in the past but are no longer currently doing so. (Tr. 288).

Furthermore, Mr. Goddard himself testified that he was advised that he would not be hired back for Fall 2016 because he had declined the Spring 2016 offer. There was no promise made of any future employment opportunities or the potential for any future appointments. (Tr. 360, 369, 375). Thus, there was not even the vague suggestion in this conversation that he may be recalled in the future as in Foam Fabricators.

The Hearing Officer's finding that Mr. Goddard continued to be employed by Marist at the time of the election is October 2016 is not supported by substantial evidence in the record. Furthermore, the Hearing Officer failed to properly apply the Board's *Foam Fabricators* analysis. Because the College clearly has no future need or plans for rehiring Mr. Goddard, and as of the end of the current semester (i.e. as we speak) he will not have worked for Marist for more than a year, all three factors that the Board considers support a finding against any reasonable expectation of return. Therefore, Mr. Goddard is not eligible under the *Foam Fabricators* test and his ballot should therefore not be counted.

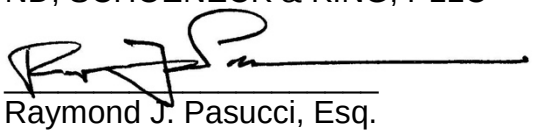
CONCLUSION

For the reasons stated above, the Employer respectfully requests that the ballots of the challenged individuals referenced be decided as set forth above.

Dated: January 17, 2017

Respectfully submitted,

BOND, SCHOENECK & KING, PLLC

By 

Raymond J. Pasucci, Esq.
Louis P. DiLorenzo, Esq.
Tyler T. Hendry, Esq.
Attorneys for Marist College
600 Third Avenue, 22nd Floor
New York, New York 10016-1915
T: 646.253.2300
F: 646.253.2301

TO: Mairead E. Connor, Esq. (via email)
Attorney for the SEIU Local 200 United
The Galleries of Syracuse, Suite 703
P.O. Box 939
440 South Warren Street
Syracuse NY 13201-0939

Rhonda P. Ley, Esq. (via email)
Regional Director
National Labor Relations Board
Niagara Center Bldg., Suite 630
130 S. Elmwood Avenue
Buffalo, NY 14202-2387

Neale K. Sutcliff (via email)
Hearing Officer
Region 3
130 South Elmwood Avenue, Suite 630
Buffalo, New York 14202-2387